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No. 98-320

In the Supreme Court of the United States

OCTOBER TERM, 1998

JAMES BASTEK, ET AL., PETITIONERS

v.

FEDERAL CROP INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' complaint was properly dismissed for failure to exhaust administrative remedies as required by 7 U.S.C. 6912(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 145 F.3d 90. The opinion of the district court (Pet. App. 12a-19a) is reported at 975 F. Supp. 534.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1998. The petition for a writ of certiorari was filed on August 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the application of 7 U.S.C. 6912(e), which requires the exhaustion of administrative appeals

on claims against the Department of Agriculture, its agencies, and its officials, to petitioners' claims against one such agency challenging its determination of the amounts of indemnities due petitioners under their federal crop insurance policies.

1. Congress adopted the Federal Crop Insurance Act, 7 U.S.C. 1501 *et seq.*, in 1938 "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance." 7 U.S.C. 1502(a). The Act created the Federal Crop Insurance Corporation (FCIC) as an agency of the Department of Agriculture to carry out that purpose. 7 U.S.C. 1503. Congress amended the Act in 1994 to require the FCIC to offer farmers a catastrophic risk protection plan to indemnify them for losses caused by natural disasters. Federal Crop Insurance Reform and Department of Agriculture Reorganization Act (Reorganization Act), Pub. L. No. 103-354, Tit. I, § 106, 108 Stat. 3184-3187, 7 U.S.C. 1508(b) (1994 & Supp. II 1996).

Congress directed the Secretary of Agriculture in the same 1994 legislation to "establish and maintain an independent National Appeals Division" to review adverse decisions rendered by officers, employees, and committees of the Department of Agriculture. Reorganization Act, Tit. II, § 272(a), 108 Stat. 3229, 7 U.S.C. 6992(a). At the same time, Congress expressly provided that a claimant's exhaustion of "all administrative appeal procedures established by the Secretary or required by law" would be a prerequisite to an action in court against the Secretary of Agriculture or an agency

of the Department of Agricuture. § 212(e), 108 Stat. 3211, 7 U.S.C. 6912(e).[1]

The Secretary of Agriculture implemented that congressional mandate by promulgating regulations establishing the National Appeals Division and elaborating on the procedures for administrative appeals. See 7 C.F.R. Pt. 11. Under the statute and the implementing regulations, if a person's right to participate in, or to receive a payment under, a Department of Agriculture program has been affected by an "adverse decision" of an officer or agency of the Department of Agriculture, he may appeal to the National Appeals Division within 30 days after receiving notice of the decision. 7 U.S.C. 6996; 7 C.F.R. 11.6(b)(1).[2]

A claimant who files a timely appeal to the National Appeals Division is entitled to a hearing before a hearing officer, who has access to the case record of the

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[1] The exhaustion requirement provides:

> **(e) Exhaustion of administrative appeals**
>
> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against—
>
> (1) the Secretary;
>
> (2) the Department; or
>
> (3) an agency, office, officer, or employee of the Department.

7 U.S.C. 6912(e).

[2] The person may also request review of the adverse decision within the agency that rendered the decision, see 7 U.S.C. 6995; 7 C.F.R. Pt. 780, but agency review is not always a prerequisite to appeal to the National Appeals Division, see 7 U.S.C. 6996; 7 C.F.R. 11.5.

agency decision and may require the attendance of witnesses and the production of evidence. 7 U.S.C. 6997. After receiving notice of the hearing officer's determination, the claimant may appeal the determination to the Director of the National Appeals Division, who will review the hearing officer's determination "using the case record, the record from the evidentiary hearing * * *, the request for review, and such other arguments or information as may be accepted by the Director." 7 U.S.C. 6998(b). If the claimant does not appeal the hearing officer's determination to the Director, the hearing officer's determination is "administratively final," 7 U.S.C. 6997(d); if the claimant does appeal the hearing officer's determination, the Director's determination becomes the "final determination," 7 U.S.C. 6998(b). "A final determination of the [National Appeals] Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5." 7 U.S.C. 6999.[3]

The Reorganization Act distinguishes between an agency decision that is "adverse to [an] individual participant and thus appealable" to the National Appeals Division, and an agency decision that is "a matter of general applicability and thus not subject to appeal." 7 U.S.C. 6992(d). If an agency determines that a decision is not appealable, the claimant has 30 days to ask the

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[3] The Secretary of Agriculture's regulations repeat and elaborate on the administrative exhaustion requirement of 7 U.S.C. 6912(e). The regulations provide that "program participants shall seek review of an adverse decision before a Hearing Officer of the [National Appeals] Division, and may seek further review by the Director [of the National Appeals Division], under the provisions of this part prior to seeking judicial review." 7 C.F.R. 11.2(b).

Director of the National Appeals Division to review the agency's non-appealability determination. 7 U.S.C. 6992(d); 7 C.F.R. 11.6(a). The Director will then issue a "final determination notice" affirming or reversing the agency's appealability determination and, if reversing the agency's determination, will "inform the participant of his or her right to proceed with an appeal." 7 C.F.R. 11.6(a)(2); see 7 U.S.C. 6992(d).

2. Petitioners are farmers who grow onions in Orange County, New York. Three of them obtained catastrophic risk protection crop insurance covering their 1996 onion crops through the FCIC, and one obtained catastrophic risk protection through a private insurance provider that was reinsured by the FCIC.[4] Adverse weather conditions caused petitioners to sustain losses to their 1996 onion crops. They filed claims for indemnification under their respective catastrophic risk policies. The FCIC and the private insurer did not offer the amount of indemnity to which petitioners believed they were entitled. Pet. App. 2a-4a.

In early November 1996, petitioners filed amended claims under their catastrophic risk policies. Pet. App. 4a. At about the same time, Martin R. Gold, petitioners' counsel, wrote to Secretary of Agriculture Dan Glickman and Kenneth D. Ackerman, the Acting Administrator of the Department of Agriculture's Risk Management Agency, requesting that the FCIC be

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[4] The court of appeals determined that the individual who obtained crop insurance through a private provider had standing to participate in the suit, reasoning that the Federal Crop Insurance Act authorizes suit against the FCIC by individuals whose claims have been denied by private insurers that have been approved to provide crop insurance by the FCIC. Pet. App. 3a n.1.

required to "follow the law in calculating the crop insurance indemnity due these farmers." *Id.* at 20a, 25a. He contended that certain aspects of the FCIC's calculations—including its use of previously projected market prices and its subtraction of a "salvage factor" to account for the onions that the farmers were able to sell—violated the Federal Crop Insurance Act and governing regulations. *Id.* at 23a, 28a.

On December 11, 1996, Acting Administrator Ackerman responded to petitioners' counsel, explaining that the FCIC's calculations were proper. He also noted that petitioners knew what their coverage would be when they obtained the insurance policies—at no cost to them other than "a $50 processing fee per crop per county"—and that petitioners could have chosen to purchase higher levels of protection. Pet. App. 4a-5a, 30a-34a.

In December 1996 and January 1997, Larry N. Atkinson, Director of the Raleigh Regional Service Office of the Risk Management Agency, responded by separate letters to each petitioner's indemnity claim. He explained that the method used to calculate petitioners' indemnity amounts was correct under the governing statute, regulations, and insurance policies. Pet. App. 35a-45a. He also informed petitioners of their right to pursue agency reconsideration of the indemnity calculations, to pursue appeals to the National Appeals Division, or to request mediation or alternative dispute resolution from the Risk Management Agency. *Id.* at 5a, 36a-37a, 39a-40a, 43a-44a.

3. Petitioners did not pursue any of those administrative review procedures. Pet. App. 5a. Instead, they proceeded with a suit that they had filed against the FCIC and the Secretary of Agriculture in the Southern District of New York. In their complaint,

petitioners sought a declaratory judgment that the FCIC had improperly calculated the indemnities due them under their crop insurance policies. *Id.* at 2a. The district court dismissed the complaint on the ground that petitioners had not satisfied their obligation under 7 U.S.C. 6912(e) to "exhaust all administrative appeal procedures established by the Secretary or required by law." See Pet. App. 12a-19a.

4. The court of appeals affirmed, agreeing that petitioners' failure to exhaust available administrative review procedures was fatal to their action. Pet. App. 1a-11a. The court began with the "general" proposition that "exhaustion of administrative remedies is the rule, and waiver the exception, because exhaustion serves myriad purposes." *Id.* at 7a. The court identified those purposes as including "limiting judicial interference in agency affairs," "conserving judicial resources," "preventing the 'frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency,'" and "allow[ing] the agency to develop the factual record of the case, which aids such judicial review as may be available." *Ibid.* (quoting *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969)).

The court of appeals then observed that, where Congress has expressly required exhaustion of administrative remedies, the judiciary has no discretion to disregard that requirement. Pet. App. 7a-8a (citing *McNeil* v. *United States*, 508 U.S. 106, 111 (1993)). The court recognized that "the statutory provision mandating exhaustion contained in 7 U.S.C. § 6912(e) is explicit," leaving "little doubt that Congress's intent, in enacting this statute, was to require plaintiffs to exhaust all administrative remedies before bringing suit in federal court." *Id.* at 9a. Accordingly, the court concluded that petitioners' arguments, which were

based on the judicially created exceptions to exhaustion that may apply in the absence of a statutory exhaustion requirement, were simply "unavailing." *Ibid.*

The court of appeals also rejected petitioners' attempt to "avoid the exhaustion requirement" by arguing that they were challenging the sort of "general policy" that cannot be the subject of an administrative appeal. Pet. App. 10a. The court recognized that 7 U.S.C. 6992(d) draws a distinction between a decision "adverse to [an] individual participant," which is administratively appealable, and a decision on "a matter of general applicability," which is not. *Ibid.* But the court concluded that 7 U.S.C. 6992(d) requires that any argument that a particular decision is not appealable at the administrative level must itself be "tested and exhausted before being presented in federal court." *Ibid.* The court noted that petitioners had not sought a determination that their claims were "too broad to be appealed administratively" before they filed suit in federal court. *Ibid.*

ARGUMENT

The court of appeals' decision that petitioners' failure to satisfy the express administrative exhaustion requirement of 7 U.S.C. 6912(e) required the dismissal of their complaint is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. In affirming the dismissal of petitioners' complaint, the court of appeals properly applied the axiom that "if the statute at issue explicitly mandates exhaustion as a prerequisite to judicial review, it must be enforced." Pet. App. 8a (citing *Darby* v. *Cisneros*, 509 U.S. 137, 153-154 (1993)). The statute at issue in this case explicitly mandates that "[n]otwithstanding any

other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law before the person may bring an action in a court of competent jurisdiction against" the Secretary, the Department of Agriculture, or any of its agencies, officers, or employees. 7 U.S.C. 6912(e). As the court of appeals observed, "[i]t is hard to imagine more direct and explicit language" mandating exhaustion. Pet. App. 9a (quoting *Gleichman* v. *United States Dep't of Agric.*, 896 F. Supp. 42, 44 (D. Me. 1995)). No other court of appeals has yet had the opportunity to apply 7 U.S.C. 6912(e). But several district courts have recognized that its exhaustion requirement must be strictly enforced. See, *e.g.*, *Calhoun* v. *USDA Farm Serv. Agency*, 920 F. Supp. 696, 701-702 (N.D. Miss. 1996); *Gleichman*, 896 F. Supp. at 44-46.[5]

Petitioners do not dispute that they failed to make use of any of the administrative appeal procedures set forth in the governing statutes and regulations. Those procedures were specifically referenced in the letters sent to petitioners by the Director of the Regional Service Office of the Risk Management Agency with regard to their claims. Those letters made plain that petitioners could "seek reconsideration" within the agency or "request an appeal" to the National Appeals Division to challenge the allegedly erroneous indemnity determinations. Pet. App. 36a, 39a-40a, 43a-44a. The

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[5] The *Gleichman* court reserved an exception only for claims that—unlike petitioners'—challenge the constitutionality of the applicable statutes or regulations. See *Gleichman*, 896 F. Supp. at 46; cf. *Cottrell* v. *United States*, 213 B.R. 33, 37-38 (M.D. Ala. 1997) (suggesting that government could in "rare cases" be equitably estopped from enforcing exhaustion requirement of 7 U.S.C. 6912(e)).

court of appeals correctly held that petitioners' choice not to pursue such administrative review procedures "deprived them of the opportunity to obtain relief in the district court." *Id.* at 11a.

The court of appeals also properly rejected petitioners' attempt to avoid the statutory exhaustion requirement of 7 U.S.C. 6912(e) by characterizing their claim as a challenge only to the FCIC's "general policy," rather than to their individual benefit calculations. See Pet. App. 10a. The statute contemplates that the determination whether a particular agency decision is "adverse to [an] individual participant and thus appealable" or is "a matter of general applicability and thus not subject to appeal" is to be made by the agency in the first instance and, if disputed by the claimant, by the Director of the National Appeals Division. 7 U.S.C. 6992(d); see 7 C.F.R. 11.6(a). It is not to be made by the claimant unilaterally.

2. Petitioners' first argument for reviewing the court of appeals' decision (Pet. 13-21) essentially consists of an attack on the exhaustion requirement of 7 U.S.C. 6912(e) itself. Petitioners complain that the exhaustion requirement creates "enormous procedural burdens" for persons seeking to challenge FCIC indemnity determinations (Pet. 13), and that its "practical effect" is to render such challenges "prohibitively expensive and time-consuming" (Pet. 14). Such policy arguments are properly directed to Congress, not to this Court. Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 619 (1984) (recognizing that although Medicare claimants "would clearly prefer an immediate appeal to the District Court rather than the often lengthy administrative review process," they nonetheless must "adhere to the administrative procedure which Congress has established for adjudicating their Medicare claims").

Petitioners' argument that the statutory exhaustion mandate of 7 U.S.C. 6912(e) is negated by other statutory and regulatory provisions likewise presents no ground for reviewing the court of appeals' decision. Petitioners rely on the Federal Crop Insurance Act's venue provision, which they contend (Pet. 18) is "render[ed] * * * meaningless" by the court of appeals' interpretation of 7 U.S.C. 6912(e). But the venue provision does not speak to the necessity of exhausting administrative review procedures before bringing a court challenge. It merely states that "an action on [a claim for indemnity denied by the FCIC] may be brought against the Corporation or Secretary only in the United States district court for the district in which the insured farm is located." 7 U.S.C. 1508(j)(2)(A). There is no reason to conclude that the venue provision, which by its terms acts only to limit the location of any court challenge, eliminates the exhaustion requirement set forth in 7 U.S.C. 6912(e), particularly given that the latter provision requires exhaustion "[n]otwithstanding any other provision of law."

Petitioners also point to 7 C.F.R. 780.2(c) and (d), which state that "general program provision[s] or program polic[ies]" and decisions based "solely on the application of [mathematical] formulas" are not appealable "under this part." Even if one assumes *arguendo* that petitioners' challenges would fall into any of the categories enumerated in 7 C.F.R. 780.2, that provision would not, as petitioners suggest (Pet. 16), "preclud[e]" them "from seeking administrative review of the FCIC's indemnity calculations." That regulation applies, by its terms, only to reconsideration or appeal "under this part"—*i.e.*, to the informal intra-agency review procedures governed by 7 C.F.R. Part 780. It

could not have barred petitioners from pursuing administrative appeals to the National Appeals Division, which are governed by 7 C.F.R. Part 11. Indeed, the Secretary expressly provided in the Part 780 regulations that "[n]othing in this part," which necessarily includes 7 C.F.R. 780.2(c) and (d), "prohibits a participant from filing an appeal of a final decision * * * of the Regional Service Office with NAD [*i.e.*, the National Appeals Division] in accordance with the NAD regulations." 7 C.F.R. 780.7(e).

3. There is no need for this Court to "[c]larif[y]," as petitioners urge (Pet. 21), the straightforward principle that courts must apply explicit statutory exhaustion requirements. As the court of appeals recognized (Pet. App. 7a-9a), that principle is already clearly established in this Court's decisions. It derives from the equally clear principle that courts "are not free to rewrite the statutory text" when Congress has required exhaustion. Pet. App. 8a (quoting *McNeil* v. *United States*, 508 U.S. 106, 111 (1993)); see also *McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 579 (1989) ("Our past cases have recognized that exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute.") (citing cases); 2 K. Davis & R. Pierce, *Administrative Law Treatise* § 15.3, at 318 (3d ed. 1994) ("When [an agency's organic act addresses exhaustion] courts are not free simply to apply the common law exhaustion doctrine with its pragmatic, judicially defined exceptions. Courts must, of course, apply the terms of the statute.").

The Social Security Act cases cited by petitioners (see Pet. 21-22) create no confusion about the appli-

cation of the exhaustion requirement of 7 U.S.C. 6912(e). Rather than explicitly requiring full exhaustion as a prerequisite to a court action, the Social Security Act requires a "final decision" made "after a hearing." 42 U.S.C. 405(g). Because the Social Security Act left the term "final decision" undefined, and authorized the Secretary of Health, Education, and Welfare (now the Secretary of Health and Human Services) to "flesh out" the term's meaning by regulation, the Court concluded that the Secretary had the discretion to "determin[e] in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be 'final.'" *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975). But the Court also noted that a "statutorily specified jurisdictional prerequisite" to a court action is "something more than simply a codification of the judicially developed doctrine of exhaustion," and thus that the Social Security Act's "final decision" requirement could not be "dispensed with merely by a judicial conclusion of futility." *Id.* at 766.[6]

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[6] In the Social Security Act context, the Court has recognized that "in certain special cases, deference to the Secretary's conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." *Ringer*, 466 U.S. at 618. But those "special cases" in which the courts were not required to defer to the Secretary's conclusion that a claim was not administratively exhausted involved claims quite different from those presented here. *Bowen* v. *New York*, 476 U.S. 467 (1986), for example, presented a challenge to a "systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations." *Id.* at 485. The Court distinguished *Bowen* from a case in which claimants "argu[e] merely that an agency incorrectly applied its regulation." *Ibid.* In the Second Circuit cases cited by petitioners (see Pet. 22), that court refused to excuse exhaustion, noting that the claimants, like petitioners

The statute at issue here expressly makes full exhaustion of administrative appeals a "statutorily specified jurisdictional prerequisite," mandating that participants "*shall* exhaust *all* administrative appeal procedures established by the Secretary or required by law" before bringing court challenges. 7 U.S.C. 6912(e) (emphases added); see also *Gleichman*, 896 F. Supp. at 45 (noting that the Social Security Act does not contain any "blunt prohibition against judicial review without exhaustion" similar to 7 U.S.C. 6912(e)). That statute leaves no discretion in the hands of the Secretary of Agriculture or the courts to excuse particular claimants from exhausting the administrative appeal procedures that are made applicable by statute and regulations. The court of appeals properly declined to apply any exceptions to exhaustion in defiance of the statute's clear mandate.[7]

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here, alleged merely that the agency had failed to follow the governing law in ruling upon their particular claims, rather than challenging regulations on their face. See *Pavano* v. *Shalala*, 95 F.3d 147, 150 (2d Cir. 1996); *Abbey* v. *Sullivan*, 978 F.2d 37, 45 (2d Cir. 1992).

[7] In any event, the exceptions to exhaustion, even if applicable here, would not excuse petitioners' failure to exhaust their administrative appeals. Petitioners' criticisms of the precise numbers and methods used by the FCIC in calculating their indemnities cannot plausibly be described as a "procedural challenge" that is "wholly 'collateral'" to their claims for those very indemnities. *Ringer*, 466 U.S. at 618. Petitioners have presented no "colorable showing" that their alleged monetary injury could not have been "remedied by the retroactive payment of benefits after exhaustion of [their] administrative remedies." *Ibid.* Petitioners have not alleged, nor could they, that the Secretary "in any sense waived further exhaustion." *Ibid.* Nor can petitioners show that exhaustion would have been futile merely because the FCIC's initial decision on their claims was adverse. See *id.* at 619 (holding that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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exhaustion was not futile although the Secretary of Health and Human Services had issued an administrative instruction to fiscal intermediaries barring the payment of claims for the surgical procedures that the claimants sought).